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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THOMAS F. MURPHY, Plaintiff and Appellant, v. COMBAT SPORTS ACADEMY, LLC, et al., Defendants and Respondents.	A153937 (Alameda County Super. Ct. No. HG-13-973933)

Plaintiff Thomas F. Murphy appeals from a judgment entered after the court denied his request for entry of judgment in a higher amount. We affirm. The trial court did not err in concluding that the challenged portion of the parties' settlement agreement, which provided for the entry of judgment of $150,000 if the "discounted" amount of the settlement was not paid on time, was an unlawful and unenforceable penalty provision. We also reject Murphy's challenge to the $2,500 attorney fees awarded to him as insufficient.

I. BACKGROUND

On February 27, 2009, defendants and respondents Combat Sports Academy, LLC, Mujeeb Hamid and Kirian Fitzgibbons (collectively, Combat Sports) entered into a lease of commercial property owned by Murphy and others[1] at 7100 Village Parkway in Dublin, California (the 7100 Premises). On March 21, 2011, Combat Sports entered into

[1] We refer to Murphy alone in this appeal, because he is the only plaintiff in this case.

another lease with Murphy for the property located at 7106 Village Parkway (the 7106 Premises). Combat Sports vacated the 7100 Premises at the end of the lease, owing $30,204.04 in unpaid rent. The tenancy to the 7106 Premises was abandoned in March 2013, with Combat Sports owing $20,589 in unpaid rent. Because the tenancy on the 7106 Premises was not scheduled to terminate until July 21, 2014, future rents owed at that time were $71,298.37.

On April 3, 2013, Murphy filed a complaint against Combat Sports seeking to recover unpaid and future rents for the 7100 and 7106 Premises, plus attorney fees and costs. On November 7, 2013, the trial court granted Murphy's request for a prejudgment writ of attachment in the amount of $158,334.97, an amount that included the $71,298.37 in future rents as well as costs and attorney fees.

In approximately September 2013, Murphy had re-rented the Premises at 7106 to a new tenant.

In June 2014, the parties signed a settlement of the action. Paragraph 3.1 of the settlement agreement provided, "Combat agrees to settle the Litigation by paying one hundred and fifty thousand dollars ($150,000.00), which shall be discounted to thirty-two thousand eight hundred dollars ($32,800.00) in consideration of Combat's fully performing this agreement." Combat was to make an initial payment of $2,000, followed by payments totaling $28,000 in increments of $800 on the first of each month, with a $2,800 payment on August 1, 2017. Paragraph 4.5 provided, "If Combat fails to make a payment on or before the first (1st) day of each month in which a payment is due, then [Murphy] shall not discount the one hundred fifty thousand dollars ($150,000.00) settlement amount, and instead apply to the Court, *ex parte*, upon twenty-four (24) hours' notice to Combat's attorney to have judgment entered against Combat in the amount of one hundred fifty thousand dollars ($150,000.00) less all payments Combat previously made." If Combat did make all its payments as specified, Murphy would dismiss the litigation with prejudice.

Combat made $800 monthly payments from August 2014 to January 2017 under the agreement. In April 2017, Murphy moved ex parte for entry of judgment of $150,000

less payments made, alleging that Combat had failed to make payments called for by the settlement. The trial court granted judgment of $124,800 ($150,000 less payments made), plus $2,500 in attorney fees. Having considered Murphy's briefing on *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, 499–500 (*Greentree*) and *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 CalApp.4th 635, 648 (*Jade Fashion*), the court in its order granting entry of judgment found the provision cancelling the $32,800 discount was not an unenforceable penalty.

Combat Sports moved for reconsideration of the trial court's entry of judgment and submitted points and authorities (which it had not previously filed) arguing the $32,800 discount was an impermissible penalty. On June 16, 2017, the court denied the motion for reconsideration because it lacked jurisdiction to grant reconsideration after judgment had been entered, but it vacated the judgment based on Combat Sports' excusable neglect under Code of Civil Procedure section 473, subdivision (b). The court ruled that the $124,800 judgment was an impermissible penalty and Paragraph 4.5 of the settlement agreement was unenforceable because it bore no relationship to the range of actual damages that the parties could have anticipated would flow from a breach. It noted that Combat Sports had argued it did not actually owe in excess of $150,000, because that amount (and the writ of attachment) had been based on $71,298.37 in lost future rents, and Murphy had been able to mitigate those damages by re-renting the property.

On January 16, 2018, Murphy filed a motion "supporting his entry of judgment" of $122,000 plus attorney fees and costs, based on Paragraph 4.5 of the settlement agreement, and requested $15,730 in attorney fees based on 28.6 hours of services at a rate of $550 per hour.[2] The trial court found that the motion was in substance a motion

[2] These services included 1.5 hours drafting a request for judicial notice, .5 hour drafting the supporting declaration, 1.4 hours drafting the attorney declaration supporting the entry of judgment, .3 hour drafting the notice of entry of judgment, 2.4 hours drafting the points and authorities in support of entry of judgment, .3 hour drafting the proposed order for judgment and 3.5 hours to review and draft a reply to Combat Sports' anticipated opposition and to appear and argue the motion.

for reconsideration of the motion for entry of judgment brought on April 20, 2017, and ruled upon on June 16, 2017. It denied Murphy's motion and request for attorney fees. On February 23, 2018, the court entered a stipulated judgment in favor of Murphy in an amount totaling $9,160.00 ($6,600 damages plus $2,500 in attorney fees plus $60 in costs).

Murphy appealed from the judgment,[3] arguing the trial court erred in treating the provision eliminating the "discount" as an unlawful penalty provision.

II. DISCUSSION

Murphy argues the trial court erred in denying his motion(s) to enforce a judgment of $150,000, less the amount already paid in settlement by Combat Sports. At the outset, we note that Combat Sports did not file a respondent's brief on this appeal. Accordingly, we decide the appeal on the record, the opening brief and oral argument. (Cal. Rules of Court, rule 8.220(a)(2).)

A. *Standard of Review*

The primary question in this case is whether Paragraph 4.5 of the settlement agreement set forth an illegal and unenforceable penalty in providing for a "discounted" settlement amount of $32,800, to increase to a $150,000 judgment if the same was not paid as the agreement required. Case law has held that we review de novo the question of whether the amount to be paid upon breach of a contractual term should be treated as liquidated damages or as an unenforceable penalty, at least when the interpretation of the agreement is not based on extrinsic evidence. (*Greentree*, *supra*, 163 Cal.App.4th at p. 499; *Jade Fashion*, *supra*, 229 Cal.App.4th at p. 646; *Purcell v. Schweitzer* (2014) 224 Cal.App.4th 969, 974 (*Purcell*); *McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 523.) However, recent decisions have suggested that because this

[3] Although orders on a motion for reconsideration or renewal of a motion are generally not independently appealable, Murphy could not have filed an earlier appeal from the June 17, 2017 order because an order denying a motion to enforce a settlement is generally not an appealable order. (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292–1294.) The February 2018 judgment is a final judgment and is appealable. (Code. Civ. Proc., § 904.1, subd. (a)(1).)

inquiry may involve factual questions, the issue is one reviewed under a substantial evidence standard, "and it becomes a question of law only when undisputed facts support a single reasonable conclusion." (*Vitatech Internat., Inc. v. Sporn* (2017) 16 Cal.App.5th 796, 808 (*Vitatech*); *Krechuniak v. Noorzoy* (2017) 11 Cal.App.5th 713, 722–724 (*Krechuniak*).) Under either standard, Murphy cannot prevail.

B. *General Principles: Liquidated Damages vs. Penalty Provision*

Civil Code section 1671, subdivision (b) provides, "Except as provided in subdivision (c) [governing consumer contracts and residential rentals], a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." " 'California law has . . . long recognized that a provision for liquidation of damages for contractual breach . . . can under some circumstances be designed as, and operate as, a contractual forfeiture. To prevent such operation, our laws place limits on liquidated damages clauses.' " (*Vitatech*, *supra*, 16 Cal.App.5th at p. 805.)

Generally a liquidated damages clause will be considered unreasonable and therefore unenforceable " 'if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained." [Citation.] In the absence of such relationship, a contractual clause purporting to predetermine damages "must be construed as a penalty." ' " (*Vitatech, supra*, 16 Cal.App.5th at p. 805–806; see also *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.) " 'The validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision.' " (*Krechuniak*, *supra*, 11 Cal.App.5th at p. 721.)

A liquidated damages provision is not invalid merely because it is intended to encourage a party to perform, but it must represent "a reasonable attempt to anticipate the

losses to be suffered." (*Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 656.) Whether a particular clause is a penalty or forfeiture or a bona fide provision for liquidated damages "depends upon the actual facts *not the words which may have been used in the contract*." (*Purcell, supra,* 224 Cal.App.4th at p. 975.)

When a contractual provision imposes a penalty and is ineffective, only actual damages can be imposed. (*Vitatech, supra,* 16 Cal.App.5th at p. 806.) Civil Code section 1671, subdivision (b) establishes a presumption that liquidated damage provisions in nonconsumer contracts are valid, and the party challenging the provision bears the burden to show it was unreasonable under the circumstances existing when the parties entered into the contract. (*Ibid*.)

C. *Analysis*

Here, the trial court found that the liability owed by Combat Sports to Murphy was considerably less than $150,000. Yet the parties purported to settle for that amount, "discounted" to $32,800 if Combat Sports timely paid. Murphy argues that because Combat Sports did not timely pay, it was not entitled to this "discount" and judgment should have been entered for $150,000, less amounts already paid. We disagree.

The question of whether a contractual provision sets a permissible liquidated damages provision or an unenforceable penalty clause has been considered in the context of settlement agreements that provide for payment of a greater amount than otherwise called for if the paying party defaults. In *Sybron Corp. v. Clark Hosp. Supply Corp.* (1978) 76 Cal.App.3d 896, 898–899 (*Sybron*), which was decided under a former version of Civil Code section 1671,[4] the parties reached a settlement on a complaint and cross-complaint under which the buyers would pay the seller $72,000 plus interest in 12

[4] *Sybron* remains good law notwithstanding statutory changes to Civil Code section 1671 that "made liquidated damages provisions presumptively valid in nonconsumer contracts and shifted the burden to the party challenging a provision to show it was unreasonable." (*Vitatech, supra,* 16 Cal.App.5th at p. 814, citing *Greentree, supra,* 163 Cal.App.4th at pp. 497-498.) "The amendment of the statute does not save a judgment that imposes a penalty bearing no proportional relationship to the damages that might actually flow from a breach." (*Greentree, supra,* 163 Cal.App.4th at p. 501, fn.2.)

monthly installments; if the buyers defaulted on any payment, a stipulated judgment for $100,000 could be entered in the seller's favor. After paying $42,000, the buyers became delinquent and the seller obtained a stipulated judgment of $100,000. (*Ibid*.) The appellate court held that the stipulated judgment was an unenforceable penalty and forfeiture because it bore "no reasonable relationship to actual damages suffered by [the seller] as the result of delay but to the contrary appears grossly disproportionate in amount." (*Id*. at p. 903.) A "creditor is entitled to bargain that if the installment debtor imposes upon the creditor by a continuing course of dilatory payment the creditor may accelerate and collect the entire obligation, plus a reasonable amount to compensate for delay. On the other hand, the equitable powers of the court exist to insure that the ultimate obligation imposed on the debtor is not unreasonable *in proportion* to the original obligation and the seriousness of the default." (*Ibid.*) The court reasoned that enforcement of the default provision "would result in a $28,000 penalty for delay in payment of $30,000, a penalty which bears no rational relationship to the amount of actual damages suffered." (*Ibid.*)

In *Greentree, supra*, 163 Cal.App.4th 445, the parties entered into a stipulated settlement agreement providing the defendant would pay a total of $20,000 in two installments, but if defendant defaulted, plaintiff would be entitled to have judgment entered for the full amount prayed for in the complaint ($45,000). The defendant defaulted on the first installment payment of $15,000, and the court entered judgment in favor of plaintiff for $61,232, which reflected the stipulated amount of $45,000 plus attorney fees, costs and prejudgment interest. (*Id*. at p. 498.) The appellate court reversed, concluding the stipulated judgment amounted to an unenforceable penalty under Civil Code section 1671. (*Id*. at p. 499.) The relevant breach was "the breach of the *stipulation*, not the breach of the *underlying contract*." (*Ibid*.) The parties, rather than attempting to estimate the damages that would be caused by breach of the stipulation (i.e., by the failure of the defendant to timely pay $15,000), provided that in the event of a breach, judgment would be entered in the full amount of claimed damages in the underlying lawsuit. That amount (in excess of $60,000 with fees, costs and interest) bore

no relationship to the range of actual damage the parties could anticipate from a breach of the agreement to settle the case for $20,000. " '[D]amages for the withholding of money are easily determinable—i.e., interest at prevailing rates. . . .' [Citation.] The amount of the judgment, however, was more than triple the amount for which the parties agreed to settle the case." (*Id*. at p. 500.)

The decision in *Greentree* was followed in *Purcell*, *supra*, 224 Cal.App.4th at pages 974 to 976. There, the plaintiff sued defendants to recover money loaned and one of the defendants agreed to pay $38,000 plus interest in monthly installments, with a balloon payment due on a certain date. (*Id*. at p. 972.) The settlement agreement provided that in the event the defendant breached his duty under the agreement, judgment would be entered in the amount of $85,000. (*Ibid*.) The stipulation for entry of judgment attached to the settlement agreement provided that the $85,000 was an agreed amount of monies owed and was not a penalty or forfeiture. (*Ibid*.) The appellate court held that despite this language, the trial court properly set aside a default judgment of $85,000 less payments made, which the plaintiff obtained after a late payment had been made by the defendant. (*Id.* at p. 973, 975–977.) It noted there had been no showing it would cost $85,000 to obtain a judgment, and language in the stipulation purporting to link that amount to the economics of the matter "was an obvious attempt to circumvent the public policy expressed in 1671." (*Id*. at p. 976.)

This case is very similar to *Sybron*, *Greentree* and *Purcell*. When they entered into the settlement agreement in June 2014, Murphy had mitigated his future damages by re-renting the 7106 Premises and consequently, Combat Sports owed considerably less than $150,000. Murphy was willing to settle for $32,800, and was willing to accept payments in monthly installments. Combat Sports paid these installments for about two and a half years, thus reducing the balance of $32,800 to $6,600.[5] Yet when Combat Sports was late on its payments, Murphy took a judgment, later vacated, of $127,360

[5] The parties initially disagreed on whether this amount was $4,800 or $6,600, but the stipulated judgment ultimately entered is for $6,600 in damages. We assume the remaining liability was for this amount.

($150,000 less amounts already paid). While we in no way encourage parties to default on their debts, there was no evidence it would cost Murphy anywhere close to $127,360 to recover the amount still owed. We have no hesitation in concluding the provision allowing Murphy to obtain a $150,000 judgment (less payments made) in the event of a default was an unenforceable penalty provision.

Murphy directs our attention to *Vitatech*, in which the court held a provision authorizing entry of a $303,000 judgment upon failure to timely pay $75,000 was an unenforceable penalty provision. (*Vitatech*, *supra*, 16 Cal.App.5th at p. 810.) The court in *Vitatech* followed *Sybron*, *Greentree* and *Purcell* and rejected criticisms of those cases. (*Id*. at p. 814.) Despite that result, Murphy argues *Vitatech* favors him because it establishes that invalidation of a provision as a penalty is appropriate only when there was no admission of the debt by the parties or evidence of the amount owed. This interpretation of *Vitatech* runs against the rule that we look to the costs reasonably likely to be incurred by a breach of the settlement agreement, not to the underlying debt. But assuming it is correct, Combat Sports did not owe Murphy $150,000 or acknowledge a debt in this amount. It agreed to settle the claims against it for $150,000 discounted to $32,800 (in other words, for $32,800).[6]

The pretrial writ of attachment issued in 2013 for a much greater amount ($158,334.97) was based on a claim of $71,298.37 for future rents plus $13,667.71 in interest on this amount plus estimated attorney fees of $21,646. This determination was

[6] Murphy claimed at oral argument that Combat Sports acknowledged a liability of $158,334.97 in paragraph 1.6 of the parties' settlement agreement. That paragraph states, "WHEREAS, on November 7, 2013, the Court granted [Murphy's] application for a prejudgment writ of attachment [] in the amount of one hundred fifty-eight thousand three hundred and thirty-four dollars and ninety-seven cents ($158,334.97). The Court's order is incorporated herein as if attached." The acknowledgment that a prejudgment writ of attachment had issued in this amount is not the same as an acknowledgment that the amount was in fact owed. In any event, we look to the damages that result from a breach of the settlement agreement, not the underlying debt, in assessing whether the $150,000 less amounts already paid was an unlawful penalty. (*Greentree*, *supra*, 163 Cal.Ap.4th at p. 499.)

not binding (Code Civ. Proc., § 484.100; *Loeb & Loeb v. Beverly Glen Music, Inc.* (1985) 166 Cal.App.3d 1110, 1117), and as the trial court noted in its minute orders of June 16, 2017 and February 15, 2018, Combat Sports was liable for only $23,766 in lost rents once Murphy re-rented the premises and mitigated his damages. Even if one assumes the past rent owed on the properties was $30,204.04 and $20,589, respectively, this amount is less than half of $150,000 when added to future rents.

Murphy argues the agreement in this case is akin to *Jade Fashion*, *supra*, 229 Cal.App.4th at page 645, which did not involve the breach of a settlement agreement. The defendant was a purchaser who fell behind on payments to the seller, owing a principal balance of $341,628.77 for the goods. (*Id*. at p. 639.) After negotiations, it was agreed by the parties that the debtor would make a series of installment payments, and that if it made all of its payments on time, it could take a discount of $17,500. (*Ibid*.) The debtor acknowledged in the agreement that it owed $341,628.77 for the goods. (*Ibid*.) It made late payments (*id*. at p. 640), and the creditor sued to recover the $17,500 "discount" (plus interest and fees) to which the debtor claimed it was entitled. (*Id*. at p. 641.)

The appellate court affirmed an order granting summary judgment in favor of the creditor and rejected an argument that the $17,500 discount provision was an unenforceable penalty or forfeiture. (*Jade Fashion*, *supra*, 229 Cal.App.4th at pp. 645–646.) Because the $17,500 was a part of the damages admittedly owed, the enforceability of the discount clause did not depend on whether it bore a reasonable relationship to actual damages suffered due to the late payment. (*Id*. at p. 649.) The court distinguished *Sybron*, *Greentree* and *Purcell*, noting that in each of those cases, the parties had agreed to settle a pending lawsuit for an amount that was less than the damages alleged; "If the defendant breached the settlement agreement, it would then be required to pay a fixed amount of additional damages, which was disproportionately higher than the settlement amount. In contrast, the agreement between Jade Fashion and Harkham Industries was not an agreement to settle or compromise a disputed claim. Rather, it was an agreement to forbear on the collection of a debt that was admittedly

owed for goods that had been delivered so long as timely installment payments were made." (*Id*. at p. 648.) Here, as we have already explained, Combat Sports did *not* owe Murphy $150,000 when it settled its claim, and it owed even less when it stopped making payments.

Murphy also urges us to follow *In re Premier Golf Properties, LP* (Bnkr. S.D. Cal. 2016) 564 B.R. 660. There, the parties agreed to a total debt amount of over $15 million, which was based on a loan amount, and provided that if the debtor paid a lump sum of $8.5 million, the balance of the debt would be waived. (*Id*. at p. 670.) The debtor defaulted, and the bankruptcy court held it was not a penalty to require it to pay the full amount. (*Id*. at p. 686.) The total amount of indebtedness was based on the underlying loan agreement, and while the conditional provision allowed the debtor to take advantage of the discounted payoff amount if it did not miss the payment deadline, the payment of the full amount in the event of default "was not an extra charge or punishment for violating a contractual provision—it simply required Debtor to pay what it always owed. Debtor is not being forced to pay something new and separate from the underlying note obligation. The conditional discount was merely a potential reduction in liability subject to various conditions precedent." (*Id*. at p. 693.) Here, Combat Sports' liability was nowhere close to $150,000. We conclude that *Premier Golf*, which is not binding on this Court (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 663), is in any event distinguishable from the case before us.

D. *Attorney Fees*

The court entered a judgment that included $2,500 in attorney fees, rather than the $15,730 requested in the January 2018 motion to enforce the judgment. Murphy argues this amount was "woefully inadequate" considering that Combat Sports breached its obligations under the settlement agreement. Murphy acknowledges an award of attorney fees is reviewed for abuse of discretion and will not be disturbed on appeal unless the decision was "clearly wrong." (*11382 Beach Partnership v. Libaw* (1999) 70 Cal.App.4th 212, 220.) We cannot say the trial court abused its discretion under this standard.

Attorney fees are recoverable as costs when authorized by contract. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706 (Exxess).) Paragraph 24.2 of the settlement agreement signed by the parties provided, "Should any action, suit, mediation, arbitration, or judicial proceeding be commenced regarding any controversy, claim or dispute arising out of, or relating to, this Agreement; or the breach, termination, enforcement, interpretation or validity thereof, the Party prevailing in such proceeding shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for: [¶] . . . attorneys' fees." Although paragraph 24.4 defined "prevailing party" to include the party "who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party of its claim or defense," Civil Code section 1717 governs the award of contractual attorney fees and the definition of "prevailing party" under that section cannot be avoided or altered by contract. (*Exxess*, at p. 707.) Civil Code section 1717, subdivision (b)(1) provides, "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." Under this definition, Murphy was a prevailing party on the motion(s) to enforce the judgment, as he "recovered a greater relief in the action." (Civ. Code, § 1717, subd. (b)(1).)

This does not mean Murphy was entitled to recover all attorney fees claimed. His fee request was made in connection with a motion for entry of judgment that essentially repeated arguments already rejected by the trial court—that the $150,000 fee award (less amounts paid) was an enforceable penalty provision. The trial court was entitled to reject the fees associated with this motion as unnecessary and duplicative. Moreover, Murphy recovered only $6,600 in damages pursuant to a stipulation between the parties, rather than the $122,000 he requested. The experienced trial judge was in the best position to

assess the value of the professional services rendered in her court. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

III. DISPOSITION

The judgment is affirmed. In the interests of justice, the parties shall bear their own costs.

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.